Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-210

In the Matter of the Application of County of Nassau Acquiring Property for the Mill Neck Conservation of the Area of Open Space and Excess Lands, Incorporated Village of Bayville, Town of Oyster Bay, Nassau County, New York

---

THE COUNTY OF NASSAU,

Appellee,

-against-

EVEANDRA ENTERPRISES, INC.,

Appellant.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	PAGE
(a) Opinions Below	1
(b) Grounds on Which Jurisdiction is Invoked	2
(i) Nature of Proceeding and Statute Pursuant to which Brought	2
(ii) Dates of Judgment or Decree Sought to be Reviewed	3
(iii) Statutory Provision Believed to Confer the Jurisdiction	3
(iv) Cases Believed to Sustain the Jurisdiction	4
(v) State Statute Whose Validity is Involved	4
(c) Question Presented	4
(d) Statement of Case	5
(e) Substantiality of Federal Question	8
(j) Notice of Appeal to this Court .	14
APPENDIX A - Opinion of Special Term, Supreme Court, Nassau County	1a

TABLE OF CONTENTS

	PAGE
APPENDIX B - Opinion and Order, Appellate Division, Supreme Court, Second Department	5a
APPENDIX C - Decision, Court of Appeals, Appealed From	8a
APPENDIX D - Order, Court of Appeals, Appealed From	10a
APPENDIX E - Notice of Appeal to Court of Appeals	11a
APPENDIX F - Partial Tentative Decree, Special Term, Supreme Court, Nassau County	14a
APPENDIX G - Notice of Objections to Partial Tentative Decree, Special Term, Supreme Court, Nassau County	18a
APPENDIX H - Notice of Appeal to the Supreme Court of the United States	20a

CASES CITED

Brooks-Scanlon Corp. v. U.S., 265 U.S. 106 (1924)	13
Bronx River Parkway, 259 A.D. 552 (1940), aff'd 284 N.Y. 48 (1940), aff'd *A.F. & G Realty Corp. v. City of New York*, 313 U.S. 540	13

TABLE OF CONTENTS

CASES CITED
(continued)

	PAGE
Cohen v. California, 403 U.S. 15 (1971)	4
Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921)	4
Hemersley v. Mayor, City of New York, 56 N.Y. 533	12
Jacobs v. U.S, 290 U.S. 13 (1933) .	10, 12
Keystone Associates v. Moerdler, 19 N.Y.2d 78 (1966)	10
LaPorte v. State of New York, 6 N.Y.2d 1 (1959)	12
Liggett & Myers Tobacco Co. v. U.S., 274 U.S. 215 (1927)	13
Lincoln Square Slum Clearance Project, 15 A.D.2d 153 (1961), aff'd 16 N.Y.2d 497 (1965)	11, 12
Manhattan Civic Center Area, 57 Misc. 2d 156 (1968), aff'd 32 A.D.2d 530 (1969), aff'd 27 N.Y.2d 518 (1970)	10
Matter of City of New York (In re Water Front in City of New York), 190 N.Y. 350 (1907)	10

TABLE OF CONTENTS

CASES CITED
(continued)

	PAGE
Matter of City of New York (E. 178th St.), 107 A.D.2d 22 (1905), aff'd 183 N.Y. 571 (1906)	10
Monongahela Navigation Co. v. U.S., 148 U.S. 312 (1893)	10
Olson v. U.S., 67 F.2d 24 (1933), aff'd 292 U.S. 246 (1934)	13
Phelps v. U.S., 274 U.S. 341 (1927)	10, 13
Rochester Carting Co. v. Levitt, 36 N.Y.2d 264 (1915)	8, 11
Seaboard Air Lines Ry. v. U.S., 261 U.S. 299 (1923)	9, 10, 12
Shoemaker v. U.S., 147 U.S. 282 (1893)	12
Shoshone Tribe of Indians v. U.S., 299 U.S. 476 (1937)	13
U.S. v. Blankinship, (9th Cir.) 543 F.2d 1272 (1976)	10, 13
U.S. v. Commodities Corp., 339 U.S. 124 (1950)	10
U.S. v. Creek Nation, 295 U.S. 103 (1935)	13

TABLE OF CONTENTS

CASES CITED
(continued)

	PAGE
U.S. v. Klamath etc. Tribe of Indians, 304 U.S. 119 (1938)	13
U.S. v. 100 Acres of Land, (9th Cir.) 468 F.2d 1261 (1972)	10
U.S. v. North American Transp. Co., 253 U.S. 330 (1920)	13
U.S. v. Rogers, 255 U.S. 163 (1921)	12

STATUTES CITED

28 U.S.C. §1257(2)	3
C.P.L.R. §5601(b)(1)	7
Title B, Article 1, Nassau County Administrative Code	2
§3-a(2) General Municipal Law	2, 3, 4, 5, 7
§11-38.0, Nassau County Administrative Code	5
§16, New York State Finance Law	14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO.

In the Matter of the Application of County of Nassau Acquiring Property for the Mill Neck Conservation of the Area of Open Space and Excess Lands, Incorporated Village of Bayville, Town of Oyster Bay, Nassau County, New York

---

THE COUNTY OF NASSAU,

Appellee,

-against-

EVEANDRA ENTERPRISES, INC.,

Appellant.

JURISDICTIONAL STATEMENT

(a) OPINIONS OF COURTS BELOW

The opinions of Special Term, Nassau County, and that of the Appellate Division, Second Department of the Supreme

Court of the State of New York have not been reported. The opinion of the New York State Court of Appeals has not yet been reported. Copies of the foregoing opinions are appended hereto as appendices A, B and C respectively, at pages 1a, 5a and 8a respectively.

(b) STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) NATURE OF PROCEEDING AND STATUTE PURSUANT TO WHICH BROUGHT. This is a condemnation proceeding instituted by the County of Nassau, State of New York, pursuant to Title B, Article 1 of the Nassau County Administrative Code (Laws of 1939 Ch. 272, as amended). Appellant by undisputed evidence, established at the trial that the prevailing and proper rate of interest to be added to the condemnation award for the 5-1/2 year delay in payment of the award was 9.75% per annum. This proof established the just compensation that appellant was entitled to by the Fifth Amendment made applicable by the Fourteenth Amendment to the Constitution. That the determination of the rate of interest was a judicial function in accordance with the due process provision of the Fourteenth Amendment. This is an appeal from the order of the New York State Court of Appeals affirming the order of the Appellate Division. The Appellate Division held that the appellant's evidence did not overcome the presumptive validity of the statutory rate (§ 3-a(2) General Municipal Law). The Court of Appeals held that the appropriate rate of interest is not measured by fluctuation

in categories of interest rates for public or private securities or lending; that so long as the statutory rate constitutes a judicially acceptable fair return for the deprivation of the use of that property, the statutory rate should be considered proper.

Appellant contends that §3-a(2) of the General Municipal Law, a state statute, as applied by the New York Court of Appeals to the undisputed facts in this case, is repugnant to the guarantees and rights of the Fifth and Fourteenth Amendments to the Constitution; is in violation of the constitutional doctrine of the separation of powers of the Legislature and the Judiciary, and is in conflict with the decisions of this Court, the United States Court of Appeals and the highest Court of the State of New York.

(ii) DATES OF JUDGMENT OR DECREE SOUGHT TO BE REVIEWED. The order of the New York State Court of Appeals was dated June 7, 1977, and filed in the Office of the County Clerk of Nassau County on June 15, 1977, a copy of which is appended hereto as Appendix D at page 10a. The Notice of Appeal to the Court of Appeals dated May 7, 1976 was filed on May 10, 1976 in the Office of the Clerk of the County of Nassau, a copy of which is appended hereto as Appendix E at page 11a.

(iii) STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION. The statutory provision believed to confer on this Court jurisdiction is 28 U.S.C. 1257(2).

(iv) CASES BELIEVED TO SUSTAIN THE JURISDICTION. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *Cohen v. California*, 403 U.S. 15 (1971).

(v) STATE STATUTE WHOSE VALIDITY IS INVOLVED. §3-a(2) of the General Municipal Law, as amended by L1939 C 1102 (23 McKinney's Consolidated Laws of New York) whose validity as applied to the undisputed facts in this case, is drawn into question by the decision of the New York State Court of Appeals, reads in part as follows:

> "§3-a. Rate of interest on judgments and accrued claims against municipal corporations.
>
> "2. The rate of interest to be paid upon any judgment or accrued claim against the municipal corporation arising out of condemnation proceedings or action to recover damages for wrongful death shall not exceed six per centum per annum.
>
> "3. The term 'municipal corporation' as used in this section shall mean and include a ... county ...."

(c) QUESTION PRESENTED

Whether, where appellant in a condemnation proceeding had established by undisputed evidence that the prevailing and fair rate of interest was 9.75 per cent per annum to be added to the award for the 5-1/2 years delay in payment of the award, is the

application by the New York State Court of Appeals of §3-a(2) of the General Municipal Law to the facts in this case, holding that the statutory interest rate of 6 per cent per annum is judicially acceptable as a fair return for the use by the county of appellant's property after the taking, a deprivation of just compensation guaranteed by the Fifth Amendment made applicable by the Fourteenth Amendment, the due process clause of the Fourteenth Amendment to the Constitution, and in conflict with this Court's decisions.

(d) STATEMENT OF CASE

The County of Nassau, State of New York, acquired appellant's property consisting of 33 acres of vacant land, in eminent domain proceedings. Partial advance payments were made to appellant in the aggregate sum of $107,725.75 with interest thereon at 6 per cent per annum from the date of title vesting. Special Term of the Supreme Court entered its partial tentative decree on January 30, 1975 making an award of $261,300.00 and which provided that "Awards carry interest at the rate of six per cent (6%) per annum from the date of vesting title, namely; October 7, 1969," a copy of the partial tentative decree is appended hereto as Appendix F at page 14a. Pursuant to §11.38.0 of the Nassau County Administrative Code, appellant, on March 3, 1975, filed verified objections to the partial tentative decree alleging: "That the said award made for the taking of your objector's property herein, constitutes the taking thereof without just compensation ... and to taking of private

property without due process of law, contrary to XIV Amendment of the Constitution of the United States of America," a copy of the objections is appended hereto as Appendix G at page 18a.

On the hearing of objections appellant's witnesses testified to and produced supporting data of the prevailing rate of interest during the 66 month period from title vesting date to the date of the trial.

James Hume, executive vice-president of the Manufacturers Trust Co. testified as to the prevailing prime rates of interest and to the practices of banks in the metropolitan area of New York City with respect to interest charges on loans during this period (A-56-107).[1] Professor Roger F. Murray, a Sloan Colt professor of banking and finance in the Graduate School of Business, Columbia University, submitted a report with exhibits and testified as to prevailing rates of interest during the period on borrowing and rates of return on investments (A-108-148). He testified that the applicable rate is midpoint between average borrowing cost during this period of 12 per cent per annum, and the county's return on short term investments of 7.5 per cent per annum, which midpoint was 9.75 per cent per annum.

At the conclusion of Professor Murray's testimony, the trial attorney for the county stated to the court that if after reviewing Professor Murray's

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[1] Numerals preceded by "A" refer to pages in Appellant's Appendix filed in the New York State Court of Appeals, which was transmitted to this Court along with a part of the original record, by the Nassau County Clerk.

testimony with his expert, he found it to be " fair statement and opinion," that there would be no need for cross-examination or proof on his part (A-129, 130). The county attorney neither cross-examined Professor Murray or offered any proof as to the prevailing rate of interest.

Special Term of the State Supreme Court held (Appendix A), that in the judicial process of determining just compensation "the court is to be guided by the applicable statute (General Municipal Law, §3-a(2) and surrounding circumstances" that the statute is "presumptively valid" and that "A review of the applicable authorities has shown" that, "the rate of interest as set by the Legislature as being fair and just compensation," the Court concluded "that the 6 per cent interest paid on the condemnation award herein is fair and within the judicial ascertainment of just compensation."

On appeal to the Appellate Division of the Supreme Court, Second Department, appellant argued in its briefs that the Special Term's application of §3-a(2) of the General Municipal Law to the undisputed facts in this case, was repugnant to the Constitution. The Appellate Division affirmed Special Term and held (Appendix B), that "In our opinion, claimant's evidence did not overcome the presumptive validity of the statutory rate."

Appellant appealed to the Court of Appeals pursuant to §5601(b)(1) of the CPLR solely on the question of the constitutionality of §3-a(2) of the General Municipal Law as applied by the Appellate

Division to the undisputed facts in this case, and stated in its notice of appeal, argued orally and in its briefs that the decision of the Appellate Division was repugnant to the Fifth and Fourteenth Amendments to the Federal Constitution and was violative of the constitutional doctrine of the separation of powers (Appendix E).

The Court of Appeals affirmed the Appellate Division and held (Appendix C), that "compensation accruing at the time of vesting and for the period prior to an award in a condemnation proceeding 'is payable as a substitute for the beneficial use of the real property' (*Matter of Rochester Carting Co. v. Levitt*, 36 N.Y.2d 264, 268)," that the appropriate interest rate is not measured by fluctuations of interest rates for public or private securities or lending, and that "so long as the statutory rate constitutes a judicially acceptable, fair return for the deprivation of the use of that property or the money equivalent of that use ... the statutory rate should be considered proper."

(e) SUBSTANTIALITY OF FEDERAL QUESTION

The questions raised in this case are substantial and reach beyond the particular condemnee here. They involve vital just compensation and due process questions affecting rights of owners of property acquired in condemnation proceedings and apply generally to all affected by statutes fixing the maximum amount of compensation. As a result of the decision of the New York

State Court of Appeals, if the constitutional question here involved is not resolved, the courts of New York will have the right to find that, despite evidence to the contrary (unchallenged as in this case), that the statutory rate of interest on condemnation awards, is "judicially acceptable." The decisions of this Court holding that the quantum of interest as part of just compensation is a judicial question, will be subverted, in that a factual determination will be permitted to be made on other than that based upon evidence. Further, the constitutionality of the decision of the Court of Appeals should be resolved with respect to its holding that the statutory rate of interest as applied to a condemnation award, represents the beneficial use (net rental value) of the property then in the ownership of the condemnor, after the taking, as distinguished from the loss of the use of the money awarded for the property. By this holding a new doctrine was established as a measure for New York State, and will be a landmark for other jurisdictions. It is at variance with the decisions of this Court, for as stated in *Seaboard Air Lines Ry. Co. v. U.S.*, 261 U.S. 299, 306, "Interest at a proper rate is a good measure by which to ascertain the amount to be so added."

The statute as applied by the Court of Appeals to the undisputed facts in this case is in direct conflict with the decisions of this Court which hold that interest on a condemnation award is part of just compensation whose determination is solely a judicial function and that the Legislature cannot say what compensation shall

be paid or what shall be the rule of compensation. *Seaboard Air Lines Ry. v. U.S.*, 261 U.S. 299 (1923); *Jacobs v. U.S.*, 290 U.S. 13 (1933); *Phelps v. U.S.*, 274 U.S. 341 (1927); *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312 (1893); *U.S. v. Commodities Corp.*, 339 U.S. 124 (1950), and to the same effect the decisions of the United States Court of Appeals, *U.S. v. Blankinship*, (9th Cir.) 543 F.2d 1272 (1976); *U.S. v. 100 Acres of Land*, (9th Cir.) 468 F.2d 1261 (1972); and as well as the decisions of the New York State Court of Appeals *Re Manhattan Civic Center Area*, 57 Misc. 2d 156 (1968), aff'd. 32 A.D.2d 530 (1969), aff'd. 27 N.Y.2d 518 (1970); *Matter of City of New York (E. 178th St.)*, 107 A.D.2d 22, 25 (1905), aff'd. 183 N.Y. 571, 576 (1906); *Keystone Associates v. Moerdler*, 19 N.Y.2d 78, 79 (1966); *Matter of City of New York (In re Water Front in the City of New York*, 190 N.Y. 350, 353 (1907).

The Court of Appeals, holding that the statutory rate of interest at 6 per cent is "judicially acceptable" as a fair return for the use of the property acquired is in direct conflict with *Phelps v. U.S.*, 274 U.S. 341, 343, 344 (1927).[2] It is the loss of the use

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[2] In *Phelps v. U.S.*, supra, the plaintiffs owned a lease on a pier which the Secretary of War requisitioned for use in carrying on the war. This Court held that the plaintiffs were "entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made," plaintiffs were entitled to "that interest at a reasonable rate from the date of the use to the time of payment (which) is a good measure of the amount to be added in order to make just compensation."

of the money awarded, by reason of the delay in payment and not compensation for the use and occupation of the property by the condemnor after the taking. As is stated in *Lincoln Square Slum Clearance Project*, 15 A.D.2d 153, 179, aff'd. 16 N.Y.2d 497:

> "The condemnee's sole damage is delay in the payment of his award. His sole claim is to an additional element of compensation for delay, which in all logic should stem from the withholding of the money he is entitled to receive on the date of the taking, and not from the rental value of property in which he no longer held any interest. 'This additional element of compensation has been measured in terms of reasonable interest' (*Allrecht v. United States*, 329 U.S. 599, 602, 67 S. Ct. 606, 608), or interest 'at a proper rate' (*Jacobs v. United States*, 290 U.S. 13, 17 ...)."

In support of its holding, the Court of Appeals cites *Matter of Rochester Carting Co. v. Levitt*, 36 N.Y.2d 264, 268 for the proposition that interest "is payable as a substitute for the beneficial use of the real property." The *Rochester* case ennunciated no such doctrine. The sole issue in that case was the constitutionality of a State statute providing for the cessation of post-judgment interest against the State of New York in condemnation proceedings. The Court in *Rochester*, in pointing out the distinction between

prejudgment and postjudgment interest in condemnation proceedings cites in dicta, *LaPorte v. State of New York*, 6 N.Y. 1, 6-7 for the proposition that "Interest accruing prior to the award is payable as a substitute for the beneficial use of real property." That no such doctrine existed was clearly pointed out in the decision by the Appellate Division in *Lincoln Square Slum Clearance Project*, 15 A.D.2d 153, 178-180 (1961) which was affirmed by the Court of Appeals in 16 N.Y.2d 497 (1965). The Appellate Division held that LaPorte ennunciated "no new doctrine," that it involved a claimant who had remained in possession after title vesting, and in such circumstance the beneficial use during that period was properly used as a set-off adjustment against interest.

No constitutional mandate is violated by a denial of interest during the period while the owner enjoyed the full beneficial use of the premises. *Shoemaker v. U.S.*, 147 U.S. 282, 302 (1893); *Hemersley v. Mayor, City of New York*, 56 N.Y. 533. There can be no set off of the value of the use in this case where the property acquired was vacant land and not occupied by appellant after title vesting.

The doctrine is well settled that value is determined as of the date of the taking and that an owner is entitled to interest at an appropriate rate on the amount of such valuation from the date of the taking for delay in payment, as part of just compensation. *U.S. v. Rogers*, 255 U.S. 163 (1921); *Seaboard Air Lines Ry. Co. v. U.S.*, 261 U.S. 299, 306 (1923); *Jacobs v. U.S.*, 290 U.S. 13, 17 (1933);

Phelps v. U.S., 274 U.S. 341, 344 (1927); *Brooks-Scanlon Corp. v. U.S*, 265 U.S. 106 (1924); *U.S. v. Creek Nation*, 295 U.S. 103 (1935); *U.S. v. Klamath etc. Tribes of Indians*, 304 U.S. 119 (1938); *Liggett & Myers Tobacco Co. v. U.S.*, 274 U.S. 215 (1927); *Shoshone Tribe of Indians v. U.S.*, 299 U.S. 476 (1937); *U.S. v. North American Transp. Co.*, 253 U.S. 330 (1920); *Olson v. U.S.*, 67 F.2d 24 (1933), affd. 292 U.S. 246 (1934). It is the amount of interest available to an owner on the amount of the award, if invested on the date of the taking. *U.S. v. Blankinship*, (9th Cir.) 543 F.2d 1272, 1274 (1976). It is only where there is an absence of proof of a proper rate of interest to afford just compensation, that the statutory rate is accepted as presumptively fair during the elapsed period, which would satisfy the constitutional requirement. *Bronx River Parkway*, 259 A.D. 552 (1940), affd. 284 N.Y. 48 (1940), affd. *A.F. & G Realty Corp. v. City of New York*, 313 U.S. 540.

The holding by the Court of Appeals that the statutory rate of interest is "judicially acceptable" as fair return for the deprivation of the use of the property, violates the due process provision of the Fourteenth Amendment. The proper rate of interest is a factual question and should be determined by the trier of fact. *U.S. v. Blankinship*, (9th Cir.) 543 F.2d 1272, 1274 (1976). There is no record evidence upon which such a finding of judicial acceptability could be predicated. There was no evidence from which it could be found that the statutory rate of six per cent per annum was a fair return for the use of appellant'a property.

The Court of Appeals cites §16 of the State Finance Law (55 McKinney's Consolidated Laws of New York). This statute has no application to the question involved in this case. It was not cited or urged by appellant in any stage of the proveeding as bearing on any issue in this case. This statute reads:

> "§16. Rate of interest on judgments and accrued claims against the State.
>
> "The rate of interest to be paid by the State upon any judgment or accrued claim against the state shall not exceed six per centum per annum."

This statute has no application to interest on a condemnation award to be paid by the County of Nassau.

(j) NOTICE OF APPEAL TO THIS COURT

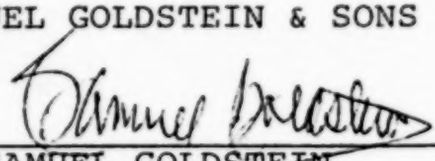
There is appended hereto as Appendix H at page 20a, the notice of appeal to this Court dated July 11, 1977 and entered in the Office of the Clerk of the County of Nassau, State of New York, on July 19, 1977.

We believe that the discussion above demonstrates that the question presented is so substantial as to require plenary consideration, with briefs on the

merits and oral argument for its resolution.

Respectfully submitted,

SAMUEL GOLDSTEIN & SONS

By: 

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APPENDIX A

OPINION OF SPECIAL TERM,
SUPREME COURT, NASSAU COUNTY

SUPREME COURT: NASSAU COUNTY, SPECIAL TERM, PART IV-A

In the Matter of the Application of the County of Nassau acquiring Real Property for the Mill Neck Conservation of the Area of Open Space and Excess Land, Incorporated Village of Bayville, Town of Oyster Bay, Nassau County, New York.

By ALBERT, J.

DATED June 13, 1975

Index No. 8960/69

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In the instant proceeding, the claimant, Eveandra Enterprises, Inc., seeks to increase the prevailing rate of 6 per cent interest paid on condemnation awards (General Municipal Law, § 3-a (2)) to 9.75 per cent on the theory that since the date of vesting, October 7, 1969, conditions in

APPENDIX A

OPINION OF SPECIAL TERM,
SUPREME COURT, NASSAU COUNTY

the money market were such that the aforesaid 6 per cent interest is unreasonably low and deprives claimant of its constitutional right of just compensation.

The issue presented in this proceeding, to wit, the appropriate interest rate in condemnation proceedings, is by no means a new question (see, e.g., *Matter of City of New York* [*Municipal Building*], 57 Misc. 2d 156, affd. 32 A.D.2d 530, affd. 27 N.Y.2d 518; *Matter of City of New York*, [*Bronx River Parkway*], 284 N.Y. 48, 54, affd. 313 U.S. 540; *Matter of Incorporated Village of Hempstead*, 33 A.D.2d 1036; *Matter of Averne II, Queens Co. Sup. Ct.* (Castaldi, J.), N.Y.L.J., June 3, 1975, p. 19, col. 8; *Matter of City of New York* [*Washington Heights-Highbridge Park Development Area*], New York Co. Sup. Ct. (Cotton, J.), N.Y.L.J., April 10, 1975, p. 14, col. 3; *Matter of Hillside Ave. & Park Ave.*, Nassau Co. Sup. Ct., Index No. 7638-70, (Meade, J.)).

Culling from the above cited cases, the principle emerges that the fixing of an appropriate rate of interest is part of the judicial process of determining "just compensation" and that the court is to be guided by the applicable statute and surrounding circumstances. While the statutory rate of interest is no doubt an important consideration, it is not conclusive upon the Court. However,

APPENDIX A

OPINION OF SPECIAL TERM,
SUPREME COURT, NASSAU COUNTY

it is presumptively valid. A review of the applicable authorities has shown that the general policy of the courts has been to follow the rate of interest as set by the Legislature as being fair and just compensation. (Cf. *Matter of Averne II, supra*; *Matter of City of New York* [*Washington-Heights-Highbridge Park Development Area*], *supra, Matter of Hillside Ave. & Park Ave., supra.*) Indeed, in the Court's view, "just" compensation essentially means "fair" compensation and does not necessarily mean the maximum possible return if invested otherwise (see also *Matter of City of New York*, [*Washington Heights-Highbridge Park Development Area*], *supra*). Though the claimant introduced economic proof in the nature of expert financial witnesses to the effect that the 6 per cent interest rate would not adequately reimburse claimant due to the economic conditions during the period in question, the Court concludes after reviewing all of the evidence adduced herein that the 6 per cent interest paid on the condemnation award herein is fair and within the judicial ascertainment of just compensation.

The case upon which claimant places principal reliance, *Matter of City of New York* [*Municipal Building*], *supra*, can be distinquished. There the court was faced with the constitutional question of whether the statutory awards

APPENDIX A

OPINION OF SPECIAL TERM, SUPREME COURT, NASSAU COUNTY

of 4 per cent by the City of New York in condemnation awards was arbitrary and unconstitutional in view of the fact that the United States Government and New York State Government were paying 6 per cent interest on similar awards. The courts decided that question in the affirmative. However, no such question is presented in the instant proceeding.

The Court has considered the other objections raised by the parties herein and the Court adheres to its original award in all respects.

Submit partial final decree on notice in accordance herewith.

s/
J. S. C.

APPENDIX B

OPINION OF THE APPELLATE DIVISION OF THE SUPREME COURT, SECOND DEPARTMENT, AND ORDER OF THE APPELLATE DIVISION

A - January 9, 1976

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

In the Matter of the Application of the County of Nassau Acquiring Real Property for Mill Neck Conservation of the Area of Open Space and Excess Land, Incorporated Village of Bayville, Town of Oyster Bay, Nassau County, New York.

COUNTY OF NASSAU,

Petitioner-Respondent,

EVEANDRA ENTERPRISES, INC.,

Claimant Appellant.

Samuel Goldstein & Sons, New York, N.Y. (Samuel Goldstein of counsel), for appellant.

John F. O'Shaughnessy, County Attorney, Mineola, N.Y. (Natale C. Tedone of counsel), for respondent.

In a condemnation proceeding, claimant appeals from so much of a partial final decree of the Supreme Court, Nassau County,

APPENDIX B

OPINION OF THE APPELLATE DIVISION OF THE SUPREME COURT, SECOND DEPARTMENT, AND ORDER OF THE APPELLATE DIVISION

entered June 26, 1975, after a hearing, as provides that the award shall carry interest at the rate of 6% per annum.

Partial final decree affirmed insofar as appealed from, with costs.

In our opinion, claimant's evidence did not overcome the presumptive validity of the statutory rate (see *Matter of City of New York* [*Bronx River Parkway*], 259 App. Div. 552, affd. 284 N.Y. 48, affd. 313 U.S. 540; *Matter of Inc. Vil. of Hempstead* [*Y.M.C.A. of Nassau & Suffolk Counties*], 33 A.D.2d 1036).

MARTUSCELLO, Acting P.J., COHALAN, MARGETT, DAMIANI and RABIN, JJ., concur.

February 2, 1976.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 2, 1976.

HON. M. HENRY MARTUSCELLO, Acting Presiding Justice,
HON. JOHN P. COHALAN, JR.)
HON. CHARLES MARGETT)
HON. VINCENT D. DAMIANI)
HON. SAMUEL RABIN) Associate Justices.

APPENDIX B

OPINION OF THE APPELLATE DIVISION OF THE SUPREME COURT, SECOND DEPARTMENT, AND ORDER OF THE APPELLATE DIVISION

[SAME TITLE]

In the above entitled cause, the above named Eveandra Enterprises, Inc., claimant, having appealed to this court from so much of a partial final decree of the Supreme Court, Nassau County, entered June 26, 1975, after a hearing, as provides that the award shall carry interest at the rate of 6% per annum; and the said appeal having been argued by Samuel Goldstein, Esq., of counsel for the appellant, and argued by Natale C. Tedone, Esq., of counsel for the respondent, due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the partial final decree insofar as appealed from is hereby unanimously affirmed, with costs.

Enter:

s/ Irving N. Selkin

Clerk of the Appellate Division

APPENDIX C

MEMORANDUM DECISION OF THE COURT OF APPEALS APPEALED FROM

STATE OF NEW YORK

COURT OF APPEALS

No. 297
In the Matter of
The County of Nassau,
Respondent,
vs.
Eveandra Enterprises, Inc.,
Appellant.

(297) Samuel Goldstein, NY City, for appellant.
William Gitelman, Nassau Cty Attorney
(Matthew C. Tedone of counsel) for respondent.

MEMORANDUM:

We agree with the Appellate Division that claimant has not demonstrated that the validity of the statutory prejudgment interest rate of 6% is constitutionally infirm. Compensation accruing at the time of vesting and for the period prior to an award in a condemnation proceeding "is payable as a substitute for the beneficial use of the real property" (*Matter of Rochester Carting Co. v. Levitt*, 36 N.Y.2d 264, 268). Such compensation is awarded in these cases upon the theory that it is necessary to make it full compensation for the loss sustained by the landowner, and we are unable to agree with the claimant that the statutory rate of interest as provided in Gen. Mun. Law

APPENDIX C

MEMORANDUM DECISION OF THE COURT OF APPEALS APPEALED FROM

§3-a(2) and State Finance Law, §16 is in conflict with the constitutional right of just compensation. The result we here reach is not unreasonable and lends stability to the mandate for the payment of full and equitable compensation as fixed by the Legislature. The appropriate interest rate is not measured by particular fluctuations in categories of interest rates for public or private securities or lending. So long as the statutory rate constitutes a judicially acceptable, fair return for the deprivation of the use of that property or the money equivalent of that use, either or in combination, the statutory rate should be considered proper.

The order of the Appellate Division should be affirmed with costs.

* * * * * * * * * * * * * * * *

Order affirmed, with costs, in a memorandum. All concur.

Decided June 7, 1977

APPENDIX D

ORDER OF COURT OF APPEALS, APPEALED FROM, DATED JUNE 7, 1977

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Charles D. Breitel, Chief Judge, Presiding

[SAME TITLE]

The appellant in the above entitled appeal appeared by Samuel Goldstein & Sons; the respondent appeared by James M. Catterson, Jr., Nassau County Attorney.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, in a memorandum. All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, County of Nassau there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/ Joseph W. Bellacosa
Joseph W. Bellacosa,
Clerk of the Court

Court of Appeals, Clerk's Office,
Albany, June 7, 1977.

APPENDIX E

NOTICE OF APPEAL TO THE COURT OF APPEALS

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

In the Matter of the Application of the County of Nassau Acquiring Real Property for Mill Neck Conservation of the Area of Open Space and Excess Land, Incorporated Village of Bayville, Town of Oyster Bay, Nassau County, New York.

COUNTY OF NASSAU,

Petitioner-Respondent,

EVEANDRA ENTERPRISES, INC.,

Claimant-Appellant.

S I R S :

PLEASE TAKE NOTICE that the claimant, Eveandra Enterprises, Inc. in the above entitled condemnation proceeding hereby appeals to the Court of Appeals as of right, pursuant to CPLR 5601(b)(1), on the ground that substantial constitutional questions are herein directly involved, from the order of the Appellate Division of the Supreme Court, Second Department, made and entered on February 2, 1976, which unanimously affirmed, insofar as appealed from to that Court, the partial final decree of the Supreme Court, Nassau

APPENDIX E

NOTICE OF APPEAL TO
THE COURT OF APPEALS

County, entered on June 26, 1976, which limited the rate of interest to be paid on the award made to the said claimant herein from the date of title vesting to 6% per annum, the rate provided by Section 3-a(2) of the General Municipal Law, contrary to said claimant's contention that the said statutory rate of interest of 6% per annum was so unreasonably low, in comparison with the prevailing rates of interest, that the effect of limiting said claimant to that rate was to deprive it of its constitutional right to receive just compensation for the taking of its property, as guaranteed by Article 1, Section 7 of the Constitution of the State of New York and the Fifth and Fourteenth Amendments of the United States Constitution; that the Court below by giving the aforesaid statute substantial evidentiary value as a matter of law, by treating it as presumptively correct in face of substantial evidence to the contrary has accorded the statute an unconstitutional construction by permitting the Legislature to exercise the judicial function of determining just compensation in violation of the constitutional doctrine of the separation of powers between the legislative and judicial branches of government; and that claimant appeals from each and every part of said order, as well as

APPENDIX E

NOTICE OF APPEAL TO
THE COURT OF APPEALS

from the whole thereof.

Dated: May 7, 1976

Yours, etc.

SAMUEL GOLDSTEIN & SONS
Attorneys for Claimant-
Appellant Eveandra
Enterprises, Inc.
Address & Post Office Address
217 Broadway
New York, N. Y. 10007
Telephone: (212) RE 2-5433

TO: Clerk, Appellate Division
Second Judicial Department
45 Monroe Place
Brooklyn, N.Y. 11201

Clerk, County of Nassau
240 Old Country Road
Mineola, New York 11501

James M. Catterson, J., Esq.
Nassau County Attorney
County Executive Building
Mineola, New York 11501

APPENDIX F

PARTIAL TENTATIVE DECREE,
SPECIAL TERM OF THE SUPREME COURT

At a Special Term of the Supreme Court for condemnation proceedings held in and for the County of Nassau at the Nassau County Supreme Court Building, Mineola, N.Y. on the 29th day of January, 1975.

PRESENT:

HON. DANIEL C. ALBERT,

JUSTICE OF SUPREME COURT.

In the Matter of the Application of the County of Nassau Acquiring Real Property for the Mill Neck Conservation of the Area of Open Space and Excess Land, Incorporated Village of Bayville, Town of Oyster Bay, Nassau County, New York.

The above entitled proceeding having been duly noticed for trial and having been placed on the Special Term Calendar of this Court for condemnation, and this proceeding having been called in its regular order on said calendar, and on due notice to all parties who have appeared herein, and the Hon. Daniel G. Albert, Justice of the Supreme Court

APPENDIX F

PARTIAL TENTATIVE DECREE,
SPECIAL TERM OF THE SUPREME COURT

having taken testimony concerning the damage awards on March 11, 12, 15, 18 and 19, 1974 and having viewed the property to be taken in this proceeding, and having duly made and filed his written decision as to the awards on December 19, 1974,

NOW, upon the said decision of Hon. Daniel G. Albert Justice of the Supreme Court, and all the proceedings heretofore had herein, it is

ORDERED, that the Hon. Daniel G. Albert, Justice of the Supreme Court in his decision dated December 19, 1974 having ascertained and estimated the compensation which ought justly to be made by the County of Nassau to the owners of the real property to be acquired, and the County Attorney of the County of Nassau having prepared by instruction of the Court the annexed tabular abstract of the estimate of damage as decided by the Court setting forth the amount of loss or damage to the parcels of real property affected by the proceeding, and said abstract also containing the names of the respective owners of such property, as far as the same may be ascertained, and a sufficient designation or description of such lots or parcels by reference to the number thereof indicated upon the damage map; such abstract when signed by the Hon. Daniel G. Albert, Justice of the Supreme Court, shall be filed with the Clerk of

APPENDIX F

PARTIAL TENTATIVE DECREE,
SPECIAL TERM OF THE SUPREME COURT

the County of Nassau and thereupon shall constitute the partial tentative decree of the Court as to the awards for damages, and be it further

ORDERED, that upon the filing of said partial tentative decree, the County Attorney of Nassau County shall give notice to all persons who have appeared in this proceeding by advertisement in the official newspapers in accordance with the provisions of Section 11-38.0 of the Nassau County Administrative Code that such partial tentative decree has been filed; that the County and all of the parties interested in the proceeding or in any of the real property affected thereby, having objections thereto, must file and serve such objections in writing, duly verified in accordance with the provisions of Section 11-38.0 of the Nassau County Administrative Code, and that the County Attorney of the County of Nassau, on a date specified in such notice, will apply to the Hon. Daniel G. Albert, Justice of the Supreme Court, who made the partial tentative decree, to fix a time when the said Hon. Daniel G. Albert, Justice of the Supreme Court, will hear the parties so objecting.

Entered
Jan. 30 1975
HAROLD W. McCONNELL
County Clerk of Nassau County

ENTER
DANIEL G. ALBERT
J.S.C.

Granted
Jan. 29 1975
HAROLD W. McCONNELL, Clerk

APPENDIX F

PARTIAL TENTATIVE DECREE,
SPECIAL TERM OF THE SUPREME COURT

TABULAR ABSTRACT

PRO. #887

REPUTED OWNER	TENTATIVE AWARD
EVEANDRA ENTERPRISES, INC.	$261,300.00 AA

Awards carry interest at the rate of six per cent (6%) per annum from the date of vesting title, namely: October 7, 1969. Awards are granted to designated parties upon their compliance with the requirements of the County Attorney as to proof of title, and are subject to the deduction of all liens, mortgages charges for use and occupancy of County property, if any, unpaid taxes, assessments and assignments of record.

Dated, Mineola, N.Y.
Jan. 29, 1975.

J.S.C.

APPENDIX G

NOTICE OF OBJECTIONS
TO THE PARTIAL TENTATIVE
DECREE OF SPECIAL TERM
OF THE SUPREME COURT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

[SAME TITLE]

Eveandra Enterprises, Inc., owner of premises described as follows:

Damage Parcel No. 15 Amount $261,300.00 without waiving any of its rights herein, do hereby object to the award made in the tentative decree of this Court herein, on the ground that the same is insufficient and inadequate and disproportionate and less than the damage sustained by reason of this proceeding.

That said award is contrary to law, contrary to the evidence and is based upon an erroneous method of awarding damages.

That the said award made for the taking of your objector property herein, constitutes the taking thereof without just compensation, contrary to Article 1, Section 7 of the Constitution of the State of New York, and to taking of private property without due process of law, contrary to the XIV Amendment of the Constitution of the United States of America.

APPENDIX G

NOTICE OF OBJECTIONS
TO THE PARTIAL TENTATIVE
DECREE OF SPECIAL TERM
OF THE SUPREME COURT

That the awarding of interest at the statutory rate of six (6%) percent per annum is unconstitutional as a denial of just compensation and an award of interest in excess thereof, as objectant is prepared to prove, should be made.

Your objector asks for an opportunity to be heard in support of these objections.

Dated, New York, New York
February 27, 1975

SAMUEL GOLDSTEIN & SONS
Attorneys for Objector
217 Broadway,
New York, N.Y. 10007

[Duly verified by
M. Robert Goldstein, Esq.
on February 27, 1975]

APPENDIX H

NOTICE OF APPEAL TO
THE SUPREME COURT OF
THE UNITED STATES,
FILED AND ENTERED IN
THE COUNTY CLERK'S
OFFICE OF NASSAU COUNTY,
NEW YORK, ON JULY 19, 1977.

COURT OF APPEALS

STATE OF NEW YORK

In the Matter of the Application of the County of Nassau Acquiring Real Property for the Mill Neck Conservation of the Area of Open Space and Excess Lands, Incorporated Village of Bayville, Town of Oyster Bay, Nassau County, New York

---

THE COUNTY OF NASSAU

Appellee

-against-

EVEANDRA ENTERPRISES, INC.

Appellant

S I R S:

PLEASE TAKE NOTICE that the above named appellant herein, EVEANDRA ENTERPRISES, INC., does hereby appeal to the Supreme Court of the United States from

APPENDIX H

NOTICE OF APPEAL TO
THE SUPREME COURT OF
THE UNITED STATES,
FILED AND ENTERED IN
THE COUNTY CLERK'S
OFFICE OF NASSAU COUNTY,
NEW YORK, ON JULY 19, 1977.

the final order of the Court of Appeals of the State of New York dated and entered June 7, 1977 holding that the statutory rate of interest constitutes a judicially acceptable return for the use of property acquired in the condemnation proceeding and that it is not measured by the appropriate rate of interest for delay in payment established by undisputed evidence at the trial, and from the whole of said order as well as each and every part thereof.

This appeal is taken pursuant to 28 U.S.C. 1257 (2).

Dated, July 11, 1977

SAMUEL GOLDSTEIN
SAMUEL GOLDSTEIN & SONS
Attorney for Appellant
Eveandra Enterprises, Inc.
217 Broadway
New York, N.Y. 10007
(212) RE2-5433

APPENDIX H

NOTICE OF APPEAL TO
THE SUPREME COURT OF
THE UNITED STATES,
FILED AND ENTERED IN
THE COUNTY CLERK'S
OFFICE OF NASSAU COUNTY,
NEW YORK, ON JULY 19, 1977.

TO: Hon. William Gitelman
County Attorney of Nassau County
State of New York
Attorney for the County of Nassau,
Appellee
Nassau County Executive Building
Mineola, New York 11501

Hon. Harold W. McConnell
County Clerk of the County of Nassau
State of New York
240 Old Country Road
Mineola, New York 11501

Hon. Joseph W. Bellacosa,
Clerk of the Court of Appeals
of the State of New York
Court of Appeals Hall
20 Eagle Street
Albany, New York 11518

Supreme Court of the United States:

The above named counsel for Appellant, SAMUEL GOLDSTEIN, a member of the bar of this Court, having duly entered his appearance herein, does hereby certify pursuant to Rule 33 (1) (3b) (4) that the above named persons which include those listed in Rule 10 (1) (2) (4) have been

APPENDIX H

NOTICE OF APPEAL TO
THE SUPREME COURT OF
THE UNITED STATES,
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THE COUNTY CLERK'S
OFFICE OF NASSAU COUNTY,
NEW YORK, ON JULY 19, 1977

served with a copy of this Notice of Appeal, by having enclosed the same in a postage prepaid envelope addressed to each of them at the addresses listed above and depositing same in a mailbox maintained by the United States Post Office.

s/_____
SAMUEL GOLDSTEIN